

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
Implementation of Section 309(j)) MM Docket No. 97-234
of the Communications Act --)
Competitive Bidding for Commercial)
Broadcast and Instructional Television)
Fixed Service Licenses)
)
Reexamination of the Policy Statement) GC Docket No. 92-52
on Comparative Broadcast Hearings)
)
Proposals to Reform the Commission's) GEN Docket No. 90-264
Comparative Hearing Process to)
Expedite the Resolution of Cases)

To: The Commission

**JOINT REPLY COMMENTS OF NATIONAL PUBLIC RADIO, INC.,
NATIONAL FEDERATION OF COMMUNITY BROADCASTERS,
THE CORPORATION FOR PUBLIC BROADCASTING,
AND THE ASSOCIATION OF AMERICA'S PUBLIC TELEVISION STATIONS**

National Public Radio, Inc. ("NPR"), the National Federation of Community Broadcasters ("NFCB"), the Corporation for Public Broadcasting ("CPB"), and the Association of America's Public Television Stations ("APTS") hereby submit these Joint Reply Comments in response to the comments filed regarding the Notice of Proposed Rulemaking, dated November 26, 1997, in the above-captioned proceedings (the "NPRM"). NPR, NFCB, CPB and APTS fully support the comments filed in this proceeding by other public broadcasting entities. These comments demonstrate that the use of auctions to resolve mutually-exclusive broadcast applications when one or more of the applicants is a public broadcaster would violate the Balanced Budget Act of 1997, harm the public interest and contradict long-standing precedent.

INTRODUCTION

As summarized below, many public broadcasting entities filed comments in this proceeding urging the Commission to abandon its proposal to use auctions to decide among mutually-exclusive broadcast applications when one or more of the applicants is a public broadcaster. NPR, NFCB, CPB and APTS file Joint Reply Comments to emphasize the consistency of the positions taken by the various public broadcast and ITFS filers. Together, these comments highlight the importance of rejecting the use of auctions when one or more of the applicants is a public broadcaster or ITFS entity and adopting a modified selection system that protects the public interest.

I. The Balanced Budget Act Exempts All Public Broadcasters From Auctions, Regardless Of Their Location On A Reserved Or Non-Reserved Frequency

Like NPR, NFCB, CPB and APTS, other noncommercial educational radio and television station licensees and organizations submitting comments in this proceeding pointed out that Section 3002(a)(2)(C) of the Balanced Budget Act of 1997 exempts noncommercial educational applicants from auctions, regardless of whether the applicant proposes a noncommercial educational service on a reserved or non-reserved frequency.¹ Congress exempted noncommercial broadcasters from auctions when they are eligible

¹ See Comments of NPR, NFCB and CPB at 5-8; Comments of APTS at 3-7; Comments of Noncommercial Educational Broadcast Licensees ("NCE Broadcast Licensees") at 3-4 (representing 11 NCE licensees); Comments of Schwartz, Woods & Miller on behalf of 23 public broadcasting and ITFS licensees at 3-4; Informal Comment Of The Rocky Mountain Corporation For Public Broadcasting at 1; Comments of Beacon Broadcasting at 2.

noncommercial educational broadcasters proposing to provide a noncommercial educational service, regardless of their frequency or channel location.²

Public broadcasting entities participating in this proceeding also demonstrated that if Congress had intended to limit the auction exemption to noncommercial educational broadcasters on reserved frequencies, it would have explicitly done so.³ Indeed, the House-Senate conference *eliminated* a clause from the original House and Senate bills that would have limited the auction exemption to applications for “channels reserved for noncommercial use.”⁴ Furthermore, the reservation of certain channels for noncommercial use is not a function of Federal law, but of FCC rules, which do not in any event limit noncommercial educational or public stations to reserved frequencies.⁵ The FCC routinely issues licenses for noncommercial educational stations throughout the AM, FM and TV bands, including licenses in two classes of service – AM radio stations and TV translator stations – where there are no “reserved” channels.⁶

² Comments of APTS at 5-6; Comments of NCE Broadcast Licensees at 3.

³ See Comments of NPR, NFCB and CPB at 6-8; Comments of APTS at 6; Informal Comment of Rocky Mountain Corporation for Public Broadcasting at 1.

⁴ Comments of NPR, NFCB and CPB at 7 (citing S. 947, 105th Cong., 1st Sess., § 3001(a)(1) (not enacted); H.R. 2015, 105th Cong., 1st Sess., § 3301(a)(1) (enacted as amended)). See Russello v. United States, 464 U.S. 16, 23-24 (1983) (“[w]here Congress includes limiting language in an earlier version of a bill but deletes it prior to enactment, it may be presumed that the limitation was not intended”).

⁵ See Comments of NPR, NFCB and CPB at 7; Comments of Schwartz, Woods & Miller at 3.

⁶ See Comments of NCE Broadcast Licensees at 5.

II. Subjecting Public Broadcasters To Auctions Would Harm The Public Interest By Restricting Access To Frequencies Necessary For The Maintenance And Expansion Of Public Broadcast Services

The comments further demonstrate that subjecting public broadcasters to auctions would harm the public interest by freezing and even reducing public broadcasting services and thus restricting diversity. The public broadcasting entities participating in this proceeding uniformly reported that they lack the substantial resources necessary to compete in auctions for broadcast licenses.⁷ However, access by public broadcasters to the non-reserved band is often essential to extend or maintain public broadcast services.

The comments submitted in this proceeding provide many striking examples of the importance of non-reserved frequencies to public broadcasters and the harm that auctions would cause. In the case of radio, because of limited space on the reserved FM band and FCC rules requiring stations in the reserved FM band to protect against interference to television channel 6 stations and other spectrum users, public radio operators are often forced to seek frequencies outside of the reserved FM band for full-service and translator stations.⁸ As a result of these limitations, many noncommercial FM

⁷ See Comments of NPR, NFCB and CPB at 13-15; Comments of Pennsylvania State University at 2; Comments of APTS at 10-11; Comments of NCE Broadcast Licensees at 5-8; Comments of Schwartz, Woods & Miller at 2; Informal Comment of Rocky Mountain Corporation for Public Broadcasting at 2. Because of the high prices garnered for media properties and the huge disparity of resources between public and commercial broadcasters, NPR, NFCB, CPB and APTS believe that the suggestion of Music Ministries and Sacred Heart University in support of bidding credits for noncommercial educational broadcasters would be insufficient to resolve the competitive disparity between public and commercial broadcasters. See Comments of Music Ministries, Inc. and Sacred Heart University, Inc. at 1-2, 4.

⁸ See, e.g., Comments of NPR, NFCB and CPB at 9-12 (reporting that approximately 72 NPR and/or NFCB member stations are currently located on the non-reserved FM band or AM band); Comments of NCE Broadcast Licensees at 5-6 (Central Michigan

translators are on non-reserved frequencies.⁹ If public broadcasters must participate in auctions on the many occasions when they are forced to relocate a translator, there could be an ultimate reduction in public radio coverage.

As a related matter, the Commission should not revise its rules to permit FM translators to interfere with full-service FM stations.¹⁰ As a matter of communications policy, there is no justification for permitting auxiliary broadcast facilities to deprive listeners of access to a primary broadcast service. While the secondary status of FM translators would undoubtedly reduce the amount of revenue an auction among commercial applicants might generate, the Commission's newly-established authority to auction broadcast spectrum does not supersede and should not defeat the Commission's long-standing mandate to assure "a fair, efficient, and equitable distribution of radio service" in a manner that serves the public interest.¹¹

University is one of the mutually-exclusive applicants for a non-reserved FM channel in Traverse City, MI, where the presence of TV Channel 6 interference and Canadian FM allocations preclude the use of the reserved FM band); Comments of Pennsylvania State University at 2 (University cannot make further use of reserved FM band because of nearby Television Channel 6); Informal Comment of Rocky Mountain Corporation for Public Broadcasting at 2 (reporting "very few, if any, reserved [FM] band channels available – even in our most remote areas").

⁹ See Comments of NPR, NFCB and CPB at 12. Indeed, the majority of nonreserved FM translators are licensed to noncommercial broadcasters. See Comments of NCE Broadcast Licensees at 5.

¹⁰ See NPRM at ¶ 80 (soliciting comment on how the auction process for FM translators might be reconciled with Commission rules requiring translator licensees to avoid interference to any regularly received FM service).

¹¹ 47 U.S.C. § 307.

Finally, the Commission's proposal to auction auxiliary television licenses threatens to cause considerable harm because there are *no* reserved channels for TV translators. Many of the 787 TV translators licensed to public television stations will be forced to seek new frequencies during the transition to digital television.¹² For example, the approximately 95 public TV translators in the Rocky Mountain States located on channels 60-69 will soon require replacement frequencies.¹³ Nonreserved channels may be necessary for new full-service public television stations as well.¹⁴ The use of auctions could freeze or even reduce public television coverage across the country.

III. Auctions Should Not Be Used To Resolve Mutually-Exclusive Modification Applications

There was wide consensus in comments filed by both noncommercial and commercial broadcasters that the Commission should avoid subjecting modification applications to auctions.¹⁵ Congress did not require the use of auctions to resolve mutually-exclusive modification applications.¹⁶ Moreover, it is unfair to subject

¹² Comments of APTS at 12. APTS requested that the Commission reaffirm its decision in its Sixth Report and Order in the DTV proceeding (at ¶ 144) that displaced TV translators will be able "to apply for a suitable replacement channel in the area without being subject to competing applications." Comments of APTS at 17-19.

¹³ Informal Comment of Rocky Mountain Corporation for Public Broadcasting at 2.

¹⁴ See Comments of NCE Broadcast Licensees at 6 (Iowa Public Broadcasting Board applied for non-reserved channel to overcome possible loss of service to community due to "cliff effect" anticipated from digital television facilities).

¹⁵ Comments of NPR, NFCB and CPB at 10; Comments of the National Association of Broadcasters ("NAB") at 2; Comments of Jacor Communications, Inc. ("Jacor") at 2-5; Comments of Cox Radio, Inc. at 1-6; Comments of Kidd Communications at 1-3.

¹⁶ See Comments of NAB at 2; Comments of Jacor at 2; Comments of Cox Radio, Inc. at 2.

broadcasters to auctions for modifications, which are typically sought to improve facilities and service to the public.¹⁷

In the case of public broadcasters, there are approximately 72 NPR and NFCB members located on the AM and nonreserved FM band. Because of public broadcasters' lack of resources, subjecting the modification applications of these stations to auctions would effectively freeze these stations at their present level of service, and prevent them from making many changes that would improve, extend or even maintain their level of service.¹⁸ Other means should be used to avoid mutual exclusivity.

IV. When A Public Broadcaster Is One Of The Applicants, The Commission Should Use A Selection Process That Preserves The Public Interest In Diversity Of Viewpoints And Universal Public Broadcast Service

The comments filed by public broadcasting in this proceeding demonstrate that an alternative to auctions is necessary when a public broadcaster is one of the competing applicants. The Commission should make every effort to implement processes that will avoid mutual exclusivity altogether. When that does not result in a clear license award, then, as APTS proposed in its Comments, the Commission should consider placing applications for new full-service and TV translator stations on a separate track when one of the applicants is a public broadcaster.¹⁹ In the alternative, the Commission should

¹⁷ See Comments of NPR, NFCB, and CPB at 10; Comments of Jacor at 3; Comments of Cox Radio, Inc. at 5.

¹⁸ See Comments of NPR, NFCB and CPB at 10.

¹⁹ See Comments of APTS at 14-16. Once a technically-acceptable application is filed by a noncommercial educational station, only other noncommercial applicants would be permitted to file for the channel. This track would use the processes developed by the

consider a system that prioritizes mutually-exclusive applications for full-service broadcast stations based on objective criteria that assure service in the public interest. Among such criteria, the Commission might include: (a) whether an applicant proposes a first or second noncommercial educational AM, FM or TV service in a geographic area, (b) whether an applicant proposes the significant involvement of or service to the local community, and (c) whether an applicant proposes a diverse program service including, for example, programming that uniquely serves the interests of minorities, women or other underserved audiences in the community.²⁰

In the case of FM translators, noncommercial broadcasters participating in this proceeding agreed that the Commission should continue to use its current processing system, set forth in Section 74.1233 of the Commission's rules, to resolve competing applications when one of the applicants is a noncommercial educational broadcaster.²¹ Similarly, noncommercial broadcasters and educators commenting in this proceeding favored the Commission's current ITFS point system for the processing of mutually-exclusive ITFS applications.²² Finally, public and commercial broadcasters agreed that

Commission to resolve mutually-exclusive applications between noncommercial educational broadcasters.

²⁰ See Comments of NPR, NFCB and CPB at 21; Comments of APTS at 15.

²¹ See, e.g., Comments of NPR, NFCB and CPB at 23; Comments of Schwartz, Woods & Miller at 6; Comments of Beacon Broadcasting at 4.

²² See, e.g., Comments of APTS at 17; Comments of CPB at 7; Comments of Schwartz, Woods & Miller at 7. Out of approximately 140 submissions in this docket, only the Hispanic Information and Telecommunications Network ("HITN") favored auctions for new mutually-exclusive applications for ITFS licenses, essentially on the grounds that auctions are speedy and administratively economical. Comments of HITN at 6-7. Whether or not auctions are speedy or administratively efficient, the fact remains that

modification applications should be exempt from auctions, and existing broadcasters should be able to modify their facilities provided they do not create interference to operating stations.

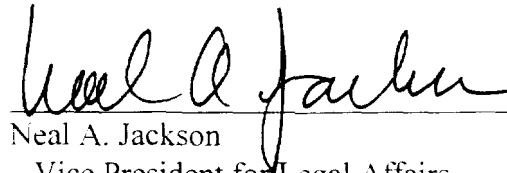
CONCLUSION

For these reasons, NPR, NFCB, CPB and APTS reiterate their opposition to the Commission's proposal to use auctions to resolve mutually-exclusive broadcast applications where one or more of the applicants is a public broadcaster, and urge the Commission to adopt alternative selection processes that promote the principles of universal public broadcast service, diversity and localism, and protect existing public broadcast stations.

competitive bidding will greatly increase the costs of acquiring an ITFS license beyond the ability of most ITFS applicants to compete, as ITFS applicants are by definition non-profit educational organizations that do not have large financial reserves upon which to draw. Consequently, a likely result of auctions will be a reduction in the number of organizations capable of bidding for ITFS licenses and a corresponding reduction in the number of students who could benefit from the opportunities provided by new ITFS services.

Respectfully submitted,

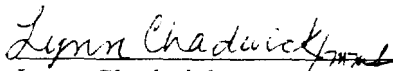
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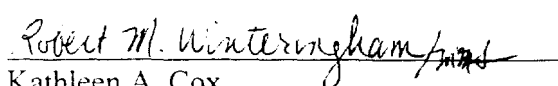
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